Supreme Court, U.S.
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No. 96-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

TIMOTHY MICHAEL GOSS,

Petitioner,

vs.

HARRY SINGLETARY and THE ATTORNEY GENERAL
OF THE STATE OF FLORIDA,
ROBERT A. BUTTERWORTH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented by this petition are:

1. Whether actual or constructive denial of counsel, and accordingly presumed prejudice, result where trial counsel for a criminal defendant relies before and during trial solely on a theory of defense that does not exist as a matter of law.

2. What quantum of proof must be met to show actual prejudice to a habeas corpus petitioner resulting from judicially held ineffective assistance of counsel at the critical stage of deciding whether to plead guilty?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Timothy Michael Goss, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on January 17, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix 1a-14a to this petition and is unpublished. The proposed findings of fact and recommendation for disposition of the magistrate judge appears at Appendix 17a-41a to this petition and is unpublished. The district court's endorsed order approving the magistrate judge's report and recommendation is unpublished and appears at Appendix 15a-16a.

JURISDICTION

The Court of Appeals entered its judgment on January 17, 1996. A timely petition for rehearing was denied by the United States Court of Appeals for the Eleventh Circuit on March 25, 1996, and a copy of the order denying rehearing

appears at Appendix 42a-43a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case requires interpretation and application of the Sixth Amendment to the Constitution of the United States, which provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. The Basis for Jurisdiction Below.

Timothy Goss was convicted of first degree felony murder by a jury in a Florida trial court and sentenced to life

in prison with a 25-year mandatory minimum of incarceration. His conviction was affirmed on direct appeal. His request for post-conviction relief in state court was denied, and that denial was affirmed on appeal.

Thereafter, Mr. Goss sought habeas corpus relief in the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. §2254. Following an evidentiary hearing, the district court denied relief, and Mr. Goss timely appealed pursuant to 28 U.S.C. §2253. A Circuit Judge of the United States Court of Appeals for the Eleventh Circuit granted petitioner's Motion for Certificate of Probable Cause. Subsequently, a panel of the court of appeals affirmed the district court and thereafter denied rehearing and rehearing en banc.

B. The Facts Material to the Questions Presented.

On April 14, 1985, Mr. Goss was at home with his girlfriend's three-year old daughter while reparing his tax return. He twice struck the girl in the abdomen after being disturbed by her crying. Later, while Mr. Goss was giving the girl a shower, she slipped and fell, hitting her back and possibly her head. On different occasions when she awoke during the night, Mr. Goss gave her water, juice and cough medicine. Mr. Goss and his girlfriend found the girl, Karrie Price, dead in bed the following morning.

Mr. Goss was charged with first degree felony murder, with aggravated child abuse as the underlying felony. Mr. Goss gave a statement to police recounting the facts above. At trial, the medical

examiner testified that blunt trauma to the abdomen resulted in the girl's death.

Defense counsel initially retained moved to suppress Mr. Goss' statements and secured an offer from the prosecutor for Mr. Goss to receive a sentence of 25 years without any mandatory minimum in exchange for a guilty plea to second degree murder. By mail, counsel so informed Mr. Goss, who was incarcerated, that this was the best that could be negotiated and directed him to sign and return a plea agreement within three days. When Mr. Goss sought to confer regarding the plea offer, he was informed that counsel was in France.

Mr. Goss' mother then contacted another attorney, Burke Chester, for a second opinion. Mr. Chester found that the Florida Standard Jury Instructions provided that felony murder was established, in pertinent part, if "[t]he

death occurred as a consequence of and while" the defendant was committing the underlying felony. The [Florida] Supreme Court Committee on Standard Jury Instructions in Criminal Cases, Standard Jury Instructions in Criminal Cases, Felony Murder-First Degree (1981 ed.) (emphasis added). Mr. Chester advised Mr. Goss and his family that he could not be convicted as charged if the jury applied this standard because Karrie did not die until several hours after being struck.

However, Mr. Chester's theory of defense was erroneous as a matter of Florida law. This issue was neither disputed nor capable of dispute below because a mere lapse of time between an underlying felony and eventual death does not operate to eliminate application of Florida's felony murder rule. See, e.g.,

Jefferson v. State, 128 So.2d 132, 136-137 (Fla. 1961).

Notwithstanding the legal nonexistence of this theory of defense, Mr. Chester persisted in pursuing solely this theory during pretrial discussions with Mr. Goss and his family, as well as at trial. He secured a stipulation for use of the standard jury instruction despite knowing that the "and while" language was a nullity as a matter of law. Although he advised Mr. Goss that the defense was technical and the state's case was strong, Mr. Chester never informed Mr. Goss that the defense was actually nonexistent as a matter of law.

The offered plea agreement remained open until the jury returned its verdict, but Mr. Chester did not tell Mr. Goss that the offer remained open during trial. As found by the magistrate judge below, Mr.

Chester never provided Mr. Goss any professional counsel or advice as to whether he should accept the plea offer or risk trial with the "and while" defense. Although prior counsel had indicated to Mr. Chester that Mr. Goss did not want to plead guilty to "murder," Mr. Chester's only discussion with Mr. Goss of the state's offer was

> [T]hat the prosecutor had reopened the deal. And he says, "You don't want that, do you?" And I said, "No, you told me you were going to do better." And he says, "Yeah, we can do better. It just shows that they're softening up." And that was about the end of the conversation on pleas and we went back to his strategy of defense.

Mr. Goss asked Mr. Chester to try to negotiate a manslaughter plea, but the prosecutor testified by affidavit below that he was never contacted for any such discussions. At trial, Mr. Chester

withdrew prior counsel's motion to suppress Mr. Goss' statements to police; challenged none of the prosecution's case by objection or cross-examination; and relied in opening statement and closing argument solely on his "and while" defense. He further unsuccessfully pursued this purported defense on direct appeal.

Following the evidentiary hearing below, the magistrate judge concluded that Mr. Chester rendered constitutionally ineffective assistance of counsel with respect to Mr. Goss' decision to accept the plea offer or go to trial. The magistrate judge, however, found that Mr. Goss had not demonstrated actual prejudice and that Mr. Chester's trial defense was not constitutionally ineffective. The courts below failed to address Mr. Goss' presumed prejudice arguments.

REASONS WHY THE WRIT SHOULD BE GRANTED

"[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." United States v. Cronic, 466 U.S. 648, 659 (1984). The first question presented in this case bears great importance for determination of cases in which trial counsel either is utterly ignorant of the law; or, as in this case, purposely relies solely on a defense that is legally nonexistent, and fails to counsel a defendant with respect to plea discussions, and, during trial, fails in any manner whatsoever to test the prosecution's case with objections or cross-examination. Additionally,

even if such an egregious failure does not result in a presumption of prejudice, the decision of the Eleventh Circuit in this case conflicts directly with Boria v. Keane, 83 F.3d 48 (2d Cir. 1996). The conflict at issue turns on the important question of the quantum of proof necessary to demonstrate actual prejudice as a result of a plea agreement that was not consummated. This case, like Boria, involves circumstances where a plea agreement is offered in light of a trial defense that is nonexistent as a matter of law and accordingly so doomed as to constitute utter surrender and suicide at trial.

The first question presented involves an Eleventh Circuit decision that conflicts with Cronic, supra, on the important federal question of when presumed prejudice arises as a result of

constitutionally ineffective assistance of counsel. Moreover, both questions presented involve important questions of interpretation and application of the Sixth Amendment to the United States Constitution which have not been, but should be, resolved by this Court.

I.

THE COURT OF APPEALS' DECISION CONTRAVENES DECISIONS OF THIS COURT THAT ACTUAL OR CONSTRUCTIVE DENIAL OF COUNSEL CREATES A PRESUMPTION OF PREJUDICE TO A CRIMINAL DEFENDANT.

"Even the intelligent and educated layman...requires the guiding hand of counsel at every step in the proceedings against him." Powell v. Alabama, 287 U.S. 45, 69 (1932). This point is "as pertinent in connection with the accused's plea as... [it is] in the conduct of a trial." Williams v. Kaiser, 323 U.S. 471,

475 (1945). "Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." VonMoltke v. Gillies, 332 U.S. 708, 721 (1948) (plurality opinion). At least four circuits have recognized that an ineffectively counseled decision to reject a plea agreement and go to trial implicates the Sixth Amendment. Turner v. Tennessee, 858 F.2d 1201, 1205 (6th Cir. 1988), vacated on other grounds, 492 U.S. 902 (1989); Johnson v. Duckworth, 793 F.2d 898, 900-902 (7th Cir.), cert. denied, 479 U.S. 437 (1986); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982); Beckham v. Wainwright, 639 F.2d 262, 267 (5th Cir. 1981).

Where, as in this case, the only issue pursued by the petitioner's counsel both at the critical stage of a potential plea agreement and during trial itself was an issue that simply did not exist as a matter of law, Mr. Goss was effectively denied the assistance of counsel altogether. The conclusion of the Eleventh Circuit both ignores and conflicts directly with the teaching of United States v. Cronic, 466 U.S. 648, 659 (1984), that a presumption of prejudice attaches where an accused is denied counsel at a critical stage of criminal proceedings or counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing."

Cases in which trial counsel relies upon a sole and illusory defense, and sells such a legally non-existent defense to the client unfortunately occur, whether

through ignorance or deliberate contrivance. E.g., Kimmelman v. Morrison 477 U.S. 365 (1986) (counsel ineffective for suffering ignorance of procedural law); Cave v. Singletary, 971 F.2d 1513, 1517 (11th Cir. 1992) (attorney testified that she deliberately misstated the law in an effort to confuse the jury, but the court of appeals found that counsel completely misunderstood the law of felony murder and effectively proved prosecution's case). No evidence exists that Mr. Chester's "defense" of Mr. Goss was a calculated strategy to circumvent decisional finality by seeking to assure relief on habeas review. Mr. Chester's conduct at trial constituted a stipulation to the prosecution's case. Mr. Chester went so far as to withdraw prior counsel's motion to suppress Mr. Goss' incriminatory statements to police.

In this case, Mr. Chester simply and concededly never counseled Mr. Goss with respect to the advisability of the offered plea agreement, instead advising Mr. Goss and his family that the jury could not return a guilty verdict if it followed the legally unfounded "and while" instruction to the felony murder charge. Mr. Chester acknowledged at the evidentiary hearing that he knew that the "and while" defense was legally unfounded. However, no evidence exists that he ever so informed Mr. Goss or his family.

Mr. Chester additionally misled the state trial court by securing a stipulated order for use of the standard instruction. In promulgating the standard jury instructions, the Florida Supreme Court specifically recognized that they might be faulty. In the Matter of Use by the Trial Courts of the Standard Jury Instructions

in Criminal Cases, 431 So.2d 594, 598 (Fla. 1981) (approval of standard instructions does not relieve trial courts of duty to instruct jury correctly). Even the Assistant State Attorney who prosecuted Mr. Goss acknowledged in the proceedings below that at trial, Mr. Chester challenged none of the State's evidence by objection or cross-examination. The prosecutor recalled that Mr. Chester merely argued the legally nonexistent "and while" theory of defense.

The court of appeals erroneously failed even to consider whether Mr. Chester's representation, held by the magistrate judge to have been ineffective at the plea stage, constituted an actual or constructive denial of counsel. This case squarely presents circumstances in which the petitioner's counsel neither provided counsel to the petitioner before

or during trial with respect to an open plea offer nor subjected the prosecution's case to any meaningful adversarial testing whatsoever before or during trial. The Court should grant certiorari to review the important question of whether counsel's sole reliance on a legally nonexistent defense - with respect to a potential plea agreement, trial or both - constitutes actual or constructive denial of counsel, which requires a presumption that the constitutionally ineffective assistance of counsel prejudiced the petitioner.

II.

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS AND CONFLICTS DIRECTLY WITH A DECISION OF THE SECOND CIRCUIT REGARDING THE QUANTUM OF EVIDENCE NECESSARY TO DEMONSTRATE ACTUAL PREJUDICE RESULTING FROM INEFFECTIVE ASSISTANCE OF COUNSEL AT THE CRITICAL STAGE OF PLEA NEGOTIATIONS.

The burden of demonstrating actual prejudice resulting from ineffective assistance of counsel is lower than a standard of proof by a preponderance of the evidence. Strickland v. Washington, 566 U.S. 668, 694 (1984). The Court of Appeals in this case erroneously found that Mr. Goss failed to demonstrate a reasonable probability of a different result with respect to plea negotiations absent trial counsel's ineffectiveness with respect to an offered plea agreement.

The record in this case demonstrates that Mr. Goss directed his trial counsel

to attempt to negotiate a plea agreement to a charge of manslaughter and testified to a reasonable probability that, but for Mr. Chester's advice, he would have accepted the second degree murder plea agreement offered by the State. An uncompensated criminal law defense expert testified that Mr. Chester was ineffective both before and during trial and that Mr. Goss suffered actual prejudice as a result.

The Court of Appeals seized on an isolated aspect of Mr. Goss' testimony that he "more than likely" would have accepted the offer absent erroneous advice from his attorney. However, the full context of this vernacular statement by Mr. Goss is as follows:

> Q: Tim, based on -- well, let me withdraw that. What was your heart of hearts going into this trial? What did

you believe was going to happen?

A. Well, I went into the trial believing that I had the law in my case, behind me. That the Florida law required that the death occurred while the incident took place. I had a feeling though that, and I explained this to Mr. Chester that, you know, here we are, we got a death of a little girl. We got me admitting doing that. And that a jury would highly likely disregard that. And I didn't feel real comfortable with this, but he told me it was the law and they had to follow that law and it was my impression that the worse [sic] I can get convicted of was second degree murder and the guidelines for that were 12 to 17.

Q: Which in your mind was better than the deal you had rejected?

A: I never really quite rejected it, but yes, sir.

Q: Explain that last answer for me.

A: No one ever anytime came to me and said that the best

thing -- opportunity -- for you to do was take the plea. And if Mr. Chester told me that this was -- this wasn't the law and this was just a crazy idea to get off on this, then I more than likely would have taken the plea. But he never said that.

Q: Did he ever do anything but encourage you to believe in that defense?

A: Yes, sir. He point blank told me they couldn't, if they followed, if the jury followed the law they could not convict me of first degree murder.

Q: Did you believe him?

A: Sometimes I did. Sometimes I didn't. But he was a lawyer and I trusted him.

The foregoing exchange demonstrates the circumstances of Mr. Goss' reliance on Mr. Chester's erroneous legal advice as to a nonexistent defense, and the context in which the State's offered plea agreement was not accepted prior to verdict.

The opinion of the Court of Appeals in this case conflicts directly with the subsequent opinion of the Second Circuit in Boria v. Keane, 83 F.3d 48 (2nd Cir. 1996). On its facts, Boria is materially identical to the circumstance of this case with respect to consideration of a plea agreement that was not accepted. As in Mr. Goss' case, the trial in Boria essentially was suicidal for the defendant, who did not want to accept a plea of guilty to drug charges because of the risk of being embarrassed in front of his children. Yet defense counsel in Boria "did nothing to persuade either his client or the father by whom he had been retained of the absurdity of a decision to risk years of prison separation from his family to avoid a few hours of embarrassment 'in front of his children.'"

83 F.3d at 51-52. The court in Boria held:

> The second Strickland question need not long detain us. Had [attorney] Greenwald - as he "often [told] drug defendants" - advised his two new clients (petitioner's father who procured and paid him and petitioner, who signed the retainer agreement) of his professional judgment that it was almost impossible for a "buy and bust" defendant to obtain an acquittal in Orange County, there would have been more than a "reasonable probability" that the father would have organized the family to persuade petitioner not to pursue the suicidal course he seemed bent upon following. Indeed, had Greenwald taken the trouble to learn of the ruinous statements petitioner had made after his arrest, the probability of persuading him to accept the plea bargain would have matured from a "reasonable probability" to a very strong likelihood.

Id. at 53. As in Mr. Goss' case, trial counsel in Boria never discussed with his client whether acceptance or rejection of the plea offer was advisable. Id. at 51.

On similar facts, the Sixth Circuit also has found actual prejudice where counsel ineffectively counseled a defendant who subsequently was convicted at trial. Turner v. Tennessee, 858 F.2d 1201, 1206-1207 (6th Cir. 1988), vacated on other grounds, 492 U.S. 902 (1989). In Turner, as with Mr. Goss, the defendant relied on counsel's incompetent advice to go to trial rather than accept an offered plea agreement. 858 F.2d at 1206.

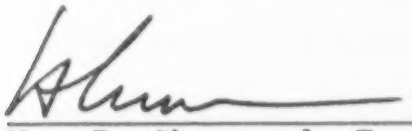
An utterly suicidal strategy and failure to advise a criminal defendant as to the advisability of accepting or rejecting an offered plea agreement produced directly conflicting holdings by the Eleventh Circuit in this case and by the Second Circuit in Boria. Both ineffectiveness and actual prejudice were found by the Second Circuit in Boria, and the opposite result of no actual prejudice

with respect to the plea decision and no ineffectiveness at trial by the Eleventh Circuit in Mr. Goss' case below. Given the directly conflicting results under the same material facts, the Court should grant this petition to resolve the important conflict between the circuits; correct the Eleventh Circuit's error holding Mr. Goss to a standard of proof higher than that described in Strickland; and clarify the important question of the quantum of proof necessary for a habeas corpus petitioner to demonstrate actual prejudice resulting from ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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June 21, 1996

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-3020
Non-Argument Calendar

D.C. Docket No. 92-395-CIV-ORL-18

TIMOTHY MICHAEL GOSS,

Petitioner-Appellant,

versus

HARRY SINGLEGARY,
ROBERT A. BUTTERWORTH,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(January 17, 1996)

Before ANDERSON, BIRCH and BLACK, Circuit Judges.

PER CURIAM:

Petitioner Timothy Michael Goss filed this action for a writ of habeas corpus challenging the legality of his conviction for first degree felony murder on the basis that he was not provided with effective assistance of counsel. The district court adopted the report and recommendation of the magistrate judge and denied Goss' petition. Goss appeals the decision of the district court. We affirm.

I. BACKGROUND

On the evening of April 14, 1985, Goss was home alone with his live-in girlfriend's three-year-old daughter, Karrie Price. Disturbed by Karrie's crying while preparing his tax return, Goss hit her in the abdomen and repeated the blow when she began to cry again. While Goss was later giving Karrie a

shower, she slipped, hitting her back and possibly her head. During the night, she awoke several times, and Goss gave her water, juice, and cough medicine on different occasions. Karrie was found dead in her bed the next morning. The cause of her death was peritonitis due to a perforated bowel resulting from blunt trauma to the abdomen.

Goss was arrested and charged with first degree felony murder based on the underlying offense of aggravated child abuse. The attorneys Goss initially retained to represent him negotiated a plea for second degree murder with a 25-year sentence and no mandatory minimum period of incarceration. The attorneys told Goss this was the best they could do.

Seeking a better result, Goss retained attorney Burke Chester to replace

the previous attorneys. Chester discovered that the standard Florida jury instruction on felony murder included the following language:

> Before you can find [Timothy Michael Goss] guilty of First Degree Felony Murder, the State must prove the following thee elements beyond a reasonable doubt:
>
> 1. [Karrie Price] is dead.
>
> 2. a. The death occurred as a consequence of **and while** [Timothy Michael Goss] was engaged in the commission of [the crime of aggravated child abuse].
>
> 3. a. [Timothy Michael Goss] was the person who actually killed [Karrie Price].

Florida Bar, Florida Standard Jury Instructions in Criminal Cases (1981 ed.) (emphasis added).

It is undisputed that the "and while" language does not accurately state the law of felony murder. Nevertheless, by stipulated motion prior to trial, Chester

had the circuit court commit to the use of this instruction. He was convinced that this "and while" defense was the only possible defense Goss had. As Karrie did not die until several hours after Goss hit her, Chester reasoned that a jury could conclude that her death did not occur "while" Goss was engaged in the commission of the crime. Chester advised Goss that if the jury literally applied the language of the instruction, he would be acquitted.

Goss persisted in his not guilty plea and was convicted by a jury of first degree felony murder. He was sentenced to life in prison with a 25-year mandatory minimum period of incarceration. The conviction was affirmed on appeal. Subsequently, Goss sought post-conviction relief in the state court based on claims of ineffective assistance of counsel.

This request was denied, and the denial was affirmed on appeal. His federal habeas corpus petition followed.

The magistrate judge found that Chester did advise Goss that the "and while" defense was a technical one and that the State had a strong case against him. The magistrate judge also found, however, that although prior counsel had informed Chester that Goss would not accept a guilty plea, Chester still did not fully advise and counsel Goss as to the merits and risk of a plea agreement as compared to a trial. In ruling on Goss' ineffective assistance of counsel claim regarding the plea bargain, the magistrate judge determined that Chester's failure to provide full counsel constituted deficient performance, but concluded that Goss did

not meet his burden of showing resulting prejudice.

In considering Goss' claims of trial error by counsel, the magistrate judge found that although the "and while" defense was legally unsound, Goss failed to meet his burden of showing that Chester was ineffective in choosing to rely on the defense. The magistrate judge further concluded that Goss did not meet his burden of showing that Chester's decision not to pursue a possible third degree murder offense constituted ineffective assistance. The magistrate judge recommended that the petition for writ of habeas corpus be denied. The district court adopted the recommendation of the magistrate judge.

In this appeal, Goss argues that: (1) the district court erred in finding that

Goss failed to meet his burden of showing actual prejudice resulting from counsel's failure to advise him fully regarding the offered plea bargain; and (2) the district court erred in finding that Goss received effective assistance of counsel when the "and while" defense presented a trial was legally non-existent.[1]

II. DISCUSSION

A. Finding that Goss Failed to Meet his Burden of Showing Actual Prejudice.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish that (1)

---

[1] Goss also raises the following issues on appeal: (1) whether the district court erred in failing to find presumed prejudice to Goss where trial counsel was ineffective; and (2) whether the district court erred in failing to review de novo the magistrate judge's proposed findings of fact and recommendation for disposition. These issues are without merit.

counsel's performance was deficient and (2) this deficiency resulted in prejudice. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). In the context of the rejected plea bargain, we conclude that Goss cannot satisfy the prejudice element of the Strickland test, so we do not consider whether counsel's performance was deficient.

To demonstrate prejudice, it is not enough to show that the plea bargain would have resulted in a lighter sentence. A defendant must show by objective evidence a reasonable probability that but for counsel's erroneous advice, the defendant would have accepted the plea offer. Diaz v. United States, 930 F.2d 832, 835 (11th Cir. 1991). This "reasonable probability" of a different result is "a probability sufficient to undermine confidence in the

outcome of the case." Agan v. Singletary, 12 F.3d 1012, 1018 (11th Cir. 1994) (citing Strickland, 104 S. Ct. at 2068).

In this case, the only evidence that Goss would have accepted the plea offer in his own testimony in hindsight that he "more than likely" would have done so. Goss rejected the plea offer despite advice from his prior counsel and repeatedly stated his unwillingness to plead to any degree of murder. Further, the testimony of Goss' family, who had numerous pre-trial discussions with him, does not reveal that there was any interest on his part in pursuing a plea bargain.

Given Goss' awareness of the plea offer, his mere after-the-fact testimony concerning his desire to plead is insufficient to establish the prejudice

element of the Strickland test. Diaz, 930 F.2d at 835. There is simply no objective evidence demonstrating with any reasonable probability that but for Chester's deficient advice, Goss would have accepted the plea bargain. The record in this case supports the magistrate judge's conclusion that Goss failed to meet his burden of showing prejudice from Chester's failure to advise him fully regarding the offered plea bargain.

B. Finding of Effective Assistance Despite the Legally Unsound Defense.

Goss claims that Chester was ineffective in choosing to rely on the "and while" defense because is represented a misstatement of law regarding felony murder. Goss is correct that the instruction does not accurately set forth the law, as there is no requirement that the death occur during the course of the

underlying felony. See Fla. Stat. §782.04(2)(h) (1985). The language Chester relied upon, however, was approved by the Florida Supreme Court and used by the circuit court. Chester was able to craft a sound legal argument from the language of this approved instruction.

In order to establish counsel's ineffectiveness under the first prong of Strickland, a defendant must show that counsel's performance fell below an objective standard of reasonableness. Strickland. The wide range of competent assistance under Strickland, 104 S.Ct. at 2064 provides room for different strategies. Felker v. Thomas, 52 F.3d 907, 912 (11th Cir. 1995). In order to constitute ineffective assistance of counsel, the defense must be one which no reasonable attorney would have undertaken.

Waters v. Thomas, 46 F.3d 1506, 1511 (11th Cir.), cert. denied, 116 S. Ct. 160 (1995).

In this case, Chester understood that he was hired to try the case and that Goss would not plead to any degree of murder. He analyzed the facts and law and concluded that the only potential defense was reliance on the mistaken "and while" jury instruction. Chester explained this strategy to Goss. Goss has not shown that no reasonable attorney would have pursued this defense under these circumstances. Accordingly, the magistrate judge was correct in concluding that Goss failed to meet his burden on this claim.

III. CONCLUSION

Goss failed to meet his burden of showing prejudice from Chester's failure to advise him fully regarding the offered

plea bargain. He also failed to show that Chester was ineffective in choosing to reply on the defense pursued at trial. The petition for writ of habeas corpus was properly denied.

AFFIRMED.

MIDDLE DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TIMOTHY MICHAEL GOSS,

Petitioner,

-vs- Case No. 91-395-Civ-Orl-18

HARRY K. SINGLETARY, et al.

Respondents.

(handwritten notation): approved petition for Writ of Habeas Corpus denied 8 Aug 94

/s/ G. Kendall Sharp
G. KENDALL SHARP
U.S. DISTRICT JUDGE

PROPOSED FINDINGS OF FACT
AND RECOMMENDATION FOR DISPOSITION

TO THE UNITED STATES DISTRICT COURT

Petitioner Timothy M. Goss, a prisoner of the State of Florida, filed this action for a writ of habeas corpus challenging the legality of his conviction for felony first degree murder. An evidentiary hearing was held before the

United States Magistrate Judge to allow Goss to provide record support for his contention that he was not provided with effective assistance of counsel.

I. BACKGROUND

A. **Facts**[1] - In April, 1985 Goss was living with a woman and her three year old daughter, Karrie. Goss was alone at home with the daughter on the evening of April 14 while the mother was at work. Disturbed at Karrie's interrupting his tax return preparations, Goss hit her in the abdomen. When she began to cry again, he repeated the blow. While Goss was later giving the daughter a shower, she slipped, hitting her back and possibly her head.

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[1] Goss confessed to this version of events.

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I. BACKGROUND

A. Facts[1] - In April, 1985 Goss was living with a woman and her three year old daughter, Karrie. Goss was alone at home with the daughter on the evening of April 14 while the mother was at work. Disturbed at Karrie's interrupting his tax return preparations, Goss hit her in the abdomen. When she began to cry again, he repeated the blow. While Goss was later giving the daughter a shower, she slipped, hitting her back and possibly her head.

During the night the daughter awoke, and Goss, on different occasions, gave her water orange juice and cough medicine. She was found dead in the bed the next morning. The medical examiner identified the cause of death as peritonitis due to a

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[1] Goss confessed to this version of events.

perforated bowel resulting from blunt trauma to the abdomen.

B. **State Court Proceedings** - Goss was arrested and charged with first degree felony murder based on the underlying offense of aggravated child abuse. Goss retained attorneys Mitchell and Bross to represent him. Those attorneys negotiated with the prosecutor a possible plea to second degree murder with a 25 year sentence (no mandatory minimum) and advised Goss that this was the best they could do.

In August 1985 Goss' mother, seeking a better result, contacted attorney Burke Chester to get another evaluation of the case. He was retained in place of the previous attorneys. Chester met with Goss and members of his family several times in the months leading to the trial.

Goss persisted in his not guilty plea and was convicted in a jury trial of first degree felony murder in January 1986. He was sentenced to life in prison with a 25 year minimum mandatory period of incarceration. The conviction was affirmed, per curiam, on appeal, Goss v. State, 500 So.2d 156 (Fla. 5th DCA 1986).

In December 1988 Goss sought post-conviction relief under Fla. R. Cr. P. 3.850 based on claims of ineffective assistance of counsel. That request was denied, and the denial was affirmed, per curiam, Goss v. State, 544 So.2d 212 (Fla. 5th DCA 1989). This federal habeas corpus petition followed.

C. Performance and Strategy of Counsel - Goss' first two attorneys analyzed his situation and advised him that the plea bargain to second degree

murder was the best they could do. Goss rejected their recommendation to accept the plea bargain at that time.

When Chester came into the case, he determined that the standard Florida jury instruction on felony murder included the following language:

> Now, before you can find the defendant guilty of first degree murder, the State must prove these elements beyond a reasonable doubt.
>
> One, that Karrie Price is dead. Two, the death occurred as a consequence of and while Timothy Michael Goss was engaged in the commission of the crime of aggravated child abuse. And three, Timothy Michael Goss was the personal who actually killed Karrie Price.

Because Karrie did not die until several hours after Goss hit her, a literal application of this language could support the conclusion that Goss' circumstances did not constitute felony

murder. All parties agree that the "and while" language and interpretation do not accurately state the law of felony murder.

Chester realized that the jury instruction was not accurate but believed the trial judge would use it because it was part of the approved standard instructions. He also concluded that this "and while" defense was the only possible defense, given the evidence (including Goss' confessions) and circumstances of the case.

Chester accordingly focused on this defense and, by stipulated motion, had the circuit court commit, prior to trial, to the use of this instruction.[2] Chester

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[2] This tactic may well have violated Chester's duty of candor to the tribunal. See Rule 4-3.3(a)(3); "A lawyer shall not knowingly ... fail to disclose to the tribunal legal authority in the contorlling jurisdiction known to the lawyer to be directly advised to the

advised Goss and his family that, if the jury followed the letter of this instruction, Goss would be acquitted. (HC Hrg. 78) Chester maintained considerable enthusiasm for this line of defense and pursued it through the trial (including closing argument) and on appeal.

Chester and the Goss family testified to differing versions of the nature and extent of Chester's advice and counseling regarding a possible guilty plea. Some of those discrepancies are likely the result of natural differences in perception of individuals discussing technical and emotional legal matters. The witnesses' recollections and characterizations could also be affected by the passage of time

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position of the client ..." Any ethical lapse in this regard is not material to the issue of Chester's effectiveness as Goss' attorney.

and self or family interest.

Considering the testimony, circumstances and events leading to Goss' trial, the evidence shows that Chester did advise Goss that the "and while" defense was a "technical" defense and that the State has a strong case against him. However, in part due to word from prior counsel that Goss would not accept a guilty plea to any degree of murder,[3] Chester did not fully advise and counsel Goss as to the merits and risks of a plea agreement compared with trial.

Instead, Chester prepared the case for trial as he had been retained to do and allowed Goss to come to his own conclusions regarding the advisability of the plea bargain. Goss maintained the

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[3] Goss himself confirmed this position to Chester.

position that he would not accept any charge of murder.

II. HABEAS CORPUS CLAIMS

Goss' challenge to his conviction is premised on the legal argument that he did not receive the effective assistance of counsel as required by the Sixth Amendment. His assertions that his counsel was ineffective in the constitutional sense has three prongs that are not entirely consistent:

1. Goss did not receive reasonably competent advice so as to allow him to make an informed decision to plead guilty to second degree murder;

2. Chester's reliance solely on the "and while" jury instruction was not a reasonable trial strategy; and

3. Chester ignored other possible strategies such as arguing for a finding of simple child abuse to support conviction for third degree murder.

The State agrees that Goss has

exhausted these claims and that the issues are properly before this Court for decision.

III. LEGAL STANDARDS

A. Effective Assistance of Counsel - The Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984) established a two-part test for determining whether a convicted person may be entitled to relief on the ground that his counsel rendered ineffective assistance. The first prong of the Strickland test requires that the defendant demonstrate that counsel's performance was deficient and "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. The second prong of the Strickland test requires the defendant to show that the deficient performance prejudiced the defense. Id.

at 687. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance. Id. at 689-90.[4]

B. Role of Counsel in Plea Negotiations - Analyzing the effectiveness of counsel regarding a possible plea agreement that never took place is problematic for several reasons. Unlike many (but not all) other aspects of a representation, the decision whether to plead guilty is ultimately made by the client after being properly advised by counsel. Counsel may (and, as part of a professionally competent representation,

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[4] In Lockhart v. Fretwell, 113 S.Ct. 838, 844 (1993), the Supreme Court clarified that the prejudice prong of the test does not focus solely on mere outcome determination; rather, to establish prejudice a criminal defendant must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable.

must) make a recommendation regarding potential plea bargains, but the attorney cannot control the result. Thus, it is the quality of the advice and recommendation that must be examined.

For a plea bargain that was never made, assessing the effect on a Defendant's rights introduces an air of unreality. Because there was no plea, the Defendant received that which the Constitution requires: a jury trial. Unlike ineffective assistance claims regarding trial preparation and performances, plea negotiation claims implicate a defendant's own decision making process. Moreover, trying to restore a defendant to his status regarding a possible plea bargain requires hypothesizing as to what the outcome would have been had the Defendant received

appropriate counsel. At all events, a claim of ineffective assistance with respect to plea bargaining is subject to the twin Strickland requirements of professional dereliction and material prejudice.

IV. ANALYSIS OF CLAIMS

A. Plea Bargain - Although the issue is not free from doubt,[5] a claim of ineffective assistance of counsel related to rejection of a proposed plea agreement may be cognizable on federal habeas corpus. See, e.g., Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981).

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[5] The result of not pleading guilty is, after all, a trial at which the Defendant receives the benefit of various rights guaranteed by the Constitution. Those rights are subject to knowing and intelligent waiver. Though there is no right to a plea bargain, a criminal Defendant is entitled to adequate counsel regarding pleading guilty and waiving trial and associated rights.

In counseling a criminal Defendant with respect to possible plea negotiations, an attorney must inter alia, analyze the strength of the government's case (factually and legally), consider various possible defenses, and weigh the likely outcomes as to probability of occurrence and their effect In doing so, an attorney must rely on and bring to bear the knowledge, experience and skill expected of a licensed attorney. To be an effective counselor the attorney must then convey to his client an appropriate analysis of the client's situation to enable the client to make a reasonably informed decision as to how to proceed in plea negotiations.

The depth and detail of the attorney's explanation may depend on the client's level of sophistication,

intelligence and other characteristics. Certainly, the attorney is not expected to raise the client's level of understanding of legal issues to that of a member of the bar. But the client should be given the attorney's specific recommendation as well as detailed information about the facts, law and available strategies for the case to allow the exercise of judgment in following or rejecting the recommendation.

In this case, Chester analyzed the facts and law and concluded that the only potential defense was reliance on the mistaken "and while" jury instruction. Chester explained this strategy to Goss and his family, including the expectation that the trial judge would use the instruction as written.

Chester also told Goss that the state's case was strong. However, Chester

did not convey to Goss, in any meaningful way, the relative weakness of the "and while" defense. Indeed, there is no indication that Chester even followed through by making a specific and reasoned recommendation to Goss on the advisability of accepting the offered plea bargain.

It appears from the record that Chester believed such a conversation and recommendation were unnecessary due to advice provided by predecessor counsel. Chester understood that he had been hired to try the case and that Goss would not, under any circumstances, accept pleading to any degree of murder. While there was some basis for Chester's belief that Goss' mind was made up, this does not excuse his failure to provide the full range of professional counsel necessary for Goss to make interim and final decision on the

plea negotiations.

It is not sufficient to rely on assumptions about the advice provided by prior counsel, particularly when a new trial strategy has been settled upon. It is not sufficient to describe that strategy to a Defendant and not put the entire case in a proper perspective with a reasoned recommendation.

On the facts of this case (and contrary to Defendant's alternative arguments), the rational and reasonable choice would have been to accept the offered plea to second degree murder. In the absence of substantial defenses and in the face of Defendant's confessions, this plea would clearly be in the Defendant's interest in trying to minimize his period of incarceration.

The first attorneys for Goss strongly

recommended taking the plea bargain. Though Goss rejected this initial recommendation, it was incumbent on Chester himself to counsel Goss realistically on this subject so long as the plea offer was open. Chester's failure to provide full counsel was ineffective assistance to Goss in his decision whether to go to trial.

Goss is not entitled to habeas corpus relief merely by showing counsel was ineffective. He must demonstrate that the incompetence prejudiced him. In the context of a reject plea bargain, it is not enough to show that the plea bargain would have resulted in a lighter sentence. Goss must show, by objective evidence, that, he had received competent counsel, he would have accepted the plea. Toro v. Fairman, 940 F.2d 1065 (7th Cir. 1991).

In this case, the only evidence that Goss would have accepted the plea is his own testimony at the habeas corpus hearing that he "more than likely" would have done so. (HC Hrg. at 195). This half-hearted self-serving declaration is ambiguous at best. It provides no objective basis for concluding Goss would have taken the plea prior to the return of the jury's verdict.

The other evidence and circumstances strongly indicate Goss would not have accepted the plea no matter how well counseled he had been. Goss himself rejected the plea despite counsel from prior counsel. He stated his unwillingness to plead to any degree of murder. The testimony of his parents and brother, who had numerous pre-trial discussion with him do not show any interest on his part in pursuing a plea

agreement.

In short, Goss has not met his burden of showing prejudice resulting from Chester's ineffective provision of counsel regarding the plea bargain.

B. **Reliance on the "and while" Defense** - As noted above, Goss' claims of trial error by counsel are inconsistent with his principal claim that he should have the benefit of a plea bargain. Nonetheless, because he did go to trial, it is appropriate to analyze his other claims of ineffective assistance of counsel.

Goss claims that Chester was incompetent in choosing to rely on the "and while" jury instruction because the instruction was a misstatement of the law regarding felony murder. The instruction does not accurately set forth the law of

felony murder. There is no requirement that death occurred during the course of the underlying felony. Yet, the language relied on by Chester was approved by the Florida Supreme Court. Chester was able to persuade the circuit judge to use the standard instruction.

Chester was thereby able to frame an argument to the jury relying on this instruction. That argument was legally unsound and ultimately unpersuasive to the jury. Yet, it was a logical argument from the language of the approved instruction.

That circumstance distinguishes this case from Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992) where counsel displayed total ignorance of the elements of felony murder and had no argument for the jury consistent with either an accurate statement of law or the actual

jury instructions.

Doubtless many defense attorneys would not have pursued this defense; Goss has not shown that "no reasonable attorney, in the circumstances, would have done so." Rogers v. Fant, 13 F.3d 384 (11th Cir. 1994). He has therefore not met his burden on this claim.

C. **Lesser Included Offense** - Goss also argues that Chester should have employed a trial strategy to encourage the jury to convict on a lesser charged - third degree murder. This argument is premised on convincing the jury to find a predicate offense of simple, rather than aggravated, child abuse. Because simple child abuse is a third degree felony, the degree of associated felony murder would also be third rather than first degree.

This argument stumbles on the statutory definition of simple child abuse in Section 827.04, F.S. (1985):

> (1) Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, permits the physical or mental health of the child to be materially endangered, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child shall be guilty of a felony of third degree, punishable as provided on § 775.082, § 775.083, or §775.084.

Goss' admitted actions simply do not fit this definition. He did not willfully "permit" physical harm to the child. He inflicted the physical harm, personally and directly. The suggestion that a jury would find Goss' underlying actions to be simply child abuse is far-fetched. Goss has not shown ineffective assistance of

counsel in Chester's decision not to pursue a possible third degree murder offense.

IV. CONCLUSION

Goss' trial lawyer did not do a professionally adequate job of counseling him with respect to the available plea bargain. However, Goss has not shown he was prejudiced by that dereliction. Goss' other claims of ineffective assistance are without merit. It is respectfully recommended that the petition for writ of habeas corpus be **DENIED.**

Failure to file written objections to the proposed findings and recommendations contained in this report and recommendation within ten (10) days of its filing shall bar the aggrieved party from attacking the factual findings on appeal.

Respectfully recommended this 8th day of July, 1994.

/s/ David A. Baker
DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Honorable G. Kendall Sharp
William J. Sheppard
Belle B. Turner

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-3020

TIMOTHY MICHAEL GOSS,

Petitioner-Appellant,

versus

HARRY SINGLEGARY,
ROBERT A. BUTTERWORTH,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: ANDERSON, BIRCH and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE